PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name Ngo (Last) Sieu (First) P. (Initial)

Prisoner Number J-07024

Institutional Address P.O. Box 689, B-319U, Soledad, CA 93960-0689

JAN 25 2008

NORTHERN DISTRICT OF CALIFORNIA

(6)

JSW

JSW

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIEU PHONG NGO

(Enter the full name of plaintiff in this action.)

vs.

BEN CUYY, Warden, CTF, and DENNIS KENNEALLY, Executive Director of the Board of Parole Hearings, et seq.

(Enter the full name of respondent(s) or jailor in this action)

CV 08 0620

Case No. _____
(To be provided by the clerk of court)

PETITION FOR A WRIT OF HABEAS CORPUS

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

"ORIGINAL"

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

County of Orange, Superior Court — Court

Santa Ana, CA — Location

(b) Case number, if known C199109

(c) Date and terms of sentence 10/21/1993; 15 yrs to life plus 1 yr.

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes XX No ____

Where?

Name of Institution: Correctional Training Facility

Address: Correctional Training Facility (Central) P.O. Box 689, B-319U, Soledad, CA 93960-0689

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Murder Second (PC § 187); with use of Firearm (Pen. Code § 12022(A)(1).)

3. Did you have any of the following?

Arraignment: Yes XX No ____

Preliminary Hearing: Yes XX No ____

Motion to Suppress: Yes ____ No XX

4. How did you plead?

Guilty XX Not Guilty ____ Nolo Contendere ____

Any other plea (specify) Plea Bargain

5. If you went to trial, what kind of trial did you have?

Jury XX Judge alone ____ Judge alone on a transcript ____

6. Did you testify at your trial? Yes ____ No XX

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes XX No ____

(b) Preliminary hearing Yes XX No ____

(c) Time of plea Yes XX No ____

(d) Trial Yes XX No ____

(e) Sentencing Yes XX No ____

(f) Appeal Yes ____ No XX N/A

(g) Other post-conviction proceeding Yes ____ No XX

8. Did you appeal your conviction? Yes ____ No XX

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes ____ No XX

Year: ____ Result: N/A

Supreme Court of California Yes ____ No XX

Year: ____ Result: N/A

Any other court Yes ____ No XX

Year: ____ Result: N/A

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes ____ No XX

(c) Was there an opinion? Yes ____ No XX

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes ____ No XX

If you did, give the name of the court and the result:

N/A

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes XX No ____

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: Orange County Superior Court

Type of Proceeding: Habeas Corpus (M-10984)

Grounds raised (Be brief but specific):

The Board of Parole hearings' decision was not supported by any evidence and resulted in a deprivation of petitioner's 5th, 6th, 8th, and 14th Amendment Rights.

Result: Relief Denied (Ex. J.) Date of Result: 8/31/2006

II. Name of Court: Court of Appeal, 4th App. District

Type of Proceeding: Habeas Corpus (G037732)

Grounds raised (Be brief but specific):

(same as listed in section I, supra.)

a. _____

b. _____

c. _____

d. _____

Result: Relief Denied (Ex. K.) Date of Result: 11/4/2006

III. Name of Court: California Supreme Court

Type of Proceeding: Habeas Corpus (S148684)

Grounds raised (Be brief but specific):

a. (same)

b. _____

c. _____

d. _____

Result: Relief Denied (Ex. L.) Date of Result: 5/23/2007

IV. Name of Court: N/A

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a. N/A

b. _____

c. _____

d. _____

Result: N/A Date of Result: _____

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes ____ No XX

Name and location of court: N/A

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

need more space. Answer the same questions for each claim.

[Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

Claim One: See page 5 of Brief in Support of petition, attached hereto.

Supporting Facts: Contrary to Supreme Court precedent the State Court erroneously ruled that the BPH was not required to consider the governing regulations at petitioner's recent parole consideration hearing, when determining his suitability. Moreover, the Court upheld the BPH's finding that petitioner lacks insight into the commitment offense, despite medical and other evidence to the contrary. (See pages 6-12 of Brief attached hereto.)

Claim Two: THE BPH"S RELIANCE SOLELY ON THE FACTS AND RE-CHARACTERIZATION OF PETITIONER'S COMMITMENT OFFENSE TO DENY PAROLE RESULTED IN A VIOLATION OF DUE PROCESS UNDER THE 5TH AND 14TH AMENDMENTS. (See p. 2 of Brief.)

Supporting Facts: The BPH arbitrarily and capriciously denied petitioner parole, based upon the commitment offense alone, asserting that petitioner's conduct was beyond the minimum necessary to sustain a conviction for second degree murder, even though the record is not supportive of its conclusion. Further, the BPH's failure to consider all relevant factors deprived petitioner's application of receiving "due consideration." (See pages 13-20 of Brief attached hereto.)

Claim Three: N/A

Supporting Facts:

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

N/A

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

See pages 3-21 of Brief in support of petition, attached hereto.)

Do you have an attorney for this petition? Yes____ No XX

If you do, give the name and address of your attorney:

N/A

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on 1-22-2008
Date

Signature of Petitioner

(Rev. 6/02)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT

SIEU PHONG NGO, Petitioner-Appellant, v. BEN CURRY, Warden, CTF, and DENNIS KENNEALLY, Executive Director of the Board of Parole Hearings (BPH), Respondent-Appellee.	Case No. (Cal. Suprme Ct. No. S148684) Super. Ct. No. M10984

BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Sieu P. Ngo
Correctional Training Facility
Central-Facility
J-07024
P.O. Box 689, B-319U
Soledad, CA 93960-0689

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT

SIEU PHONG NGO, Petitioner-Appellant, v. BEN CURRY, Warden, CTF, and DENNIS KENNEALLY, Executive Director of the Board of Parole Hearings (BPH), Respondent-Appellee.	Case No. **BRIEF IN SUPPORT PETITION FOR WRIT OF HABEAS CORPUS**

STATEMENT OF JURISDICTION

The district court has jurisdiction to decide the petition for writ of habeas corpus filed by petitioner under 28 U.S.C. § 2254. By order filed May 23, 2007, the California Supreme Court denied review. See Exhibit L. That judgment is a final order that disposes of all petitioner's claims.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Superior Court's ruling involve an unreasonable application of "clearly established" law when it concluded that the BPH was not required to consider factors set forth in the California Code of Regulations (CCR), title 15, section 2402 and upheld the Board's finding that Petitioner demonstrated a lack of insight contrary to the reports prepared by clinical psychologist?

2. Did the BPH's reliance solely on the facts and re-characterization of Petitioner's commitment offense to deny parole result in a violation of due process under the 5th and 14th Amendments?

STATEMENT OF THE CASE

Petitioner Sieu Ngo is in the custody of the Department of Corrections and Rehabilitation at the Correctional Training Facility in Soledad, California serving a term of 16 years to life following his conviction in 1994 in Orange County Superior Court Case No. C199109 wherein petitioner was convicted of second degree murder in violation of Penal Code section 187 and it was found that petitioner was vicariously armed with a firearm within the meaning of Penal code section 12022.

Petitioner's minimum eligible release date was set for May 24, 2003. On May 13, 2002, petitioner appeared before the BPH for his initial parole eligibility hearing. He was denied parole for two years. At an August 3, 2004, subsequent hearing, he was denied parole for one year. Finally, at a February 8, 2006, hearing, petitioner was denied parole for two years. (Exhibit A.)

Petitioner then filed a writ of habeas corpus in the Superior Court of Orange County. On August 31, 2006, the Superior Court denied the writ finding that the BPH's denial was authorized by Penal Code section 3041, subdivision (b). (Exhibit J.) Citing In re Dannenberg, 34 Cal.4th 1061, 1071 (2005), the court concluded that the BPH was not required to consider the factors set forth in California Code of Regulations, title 15, section 2402. The court reasoned that in petitioner's case the BPH pointed to the gang-related nature of the offense as a factor beyond the minimum elements of second degree murder. Next, petitioner pursued the claim in a habeas

petition filed in the Court of Appeal, Fourth Appellate District, which was denied on November 9, 2006. (Exhibit K.) The California Supreme Court denied relief on May 23, 2007. (Exhibit L.)

SUMMARY OF ARGUMENT

In Greenholtz v. Inmates of Nebraska Penal, 442 U.S. 1, 7 (1979) and Board of Pardons v. Allen, 482 U.S. 369 (1987), the United States Supreme Court established in 1979 and reaffirmed in 1987 that "a state's statutory scheme, if it uses mandatory language, creates a presumption that parole release will be granted when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest." (Id. at 12; Allen, 482 U.S. at 377. The Supreme Court further added that parole board "regulations are relevant to determination of whether parole scheme gives rise to constitutionally protected liberty interest." (Allen, supra, 482 U.S. at p. 369; see also McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002) [holding that in addition to the determinations set forth in Penal Code § 3041(b), the California Code of Regulations creates "an expectation of parole protected by the Due Process Clause"].)

Moreover, the California Supreme Court has indicated that the Board must set a parole release date for a prisoner "unless [it] finds, in the exercise of its discretion, that [the prisoner is] unsuitable for parole in light of the circumstances specified by statute and regulation." (Rosenkrantz, 29 Cal.4th 616, 654 (2002).) And in so doing, "the

Board must apply detailed standards when evaluating whether an inmate is suitable for parole on pubic safety grounds." (Dannenberg, supra, 34 Cal.4th at pp. 1079-80, 1095, fn. 16.)

Here, the Superior Court's conclusion is contrary to the weight of authority indicating that the BPH is required to consider the applicable statutes and regulations governing parole decisions. Further, the Court's decision fails to address petitioner's claim that denial of parole based solely on the unchanging factor of the commitment offense violated the constitutional prohibition against cruel and unusual punishment, or that the denial lacks evidentiary support in the record. Similarly, its factual finding that the BPH's denial was authorized because the BPH concluded that petitioner "was minimizing the gravity of the crime and his involvement and demonstrating a lack of insight, is without any medical support. (Ex. J at p. 3.)

Accordingly, because the Superior Court did not review petitioner's claims in light of the "factors specified by statute and regulations" (Rosenkrantz, supra, 29 Cal.4th at p. 658) and ignored the constitutional claims altogether, Petitioner did not receive "due consideration" by means "consonant with due process." (In re Minnis, 7 Cal.3d 639, 649.) Thus, this Court should find that the State court employed an unreasonable application of "clearly established" law and denied petitioner due process under the Fifth and Fourteenth Amendments of the United States Constitution.

MEMORANDUM OF POINTS & AUTHORITIES

I

THE SUPERIOR COURT'S RULING INVOLVED AN UNREASONABLE APPLICATION OF "CLEARLY ESTABLISHED" LAW WHEN IT CONCLUDED THAT THE BPH WAS NOT REQUIRED TO CONSIDER FACTORS SET FORTH IN THE CALIFORNIA CODE OF REGULATIONS, TITLE 15, SECTION 2402 AND UPHELD THE BOARD'S FINDING THAT PETITIONER DEMONSTRATED A LACK OF INSIGHT CONTRARY TO THE REPORTS PREPARED BY CLINICAL PSYCHOLOGISTS

A state court decision is "contrary to" clearly established United States Supreme Court precedent "if it applies a rule that contradicts the governing law set forth in [Supreme Court] cases, 'or if it confronts a set of facts that are materially indistinguishable from a "decision'" of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. (Early v. Packer, 537 U.S. 3, 8 (2002) (quoting Williams v. Taylor, 529 U.S. 362, 405-06.) Additionally, if the state court identifies the correct governing legal principle to the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case, the state court's decision has been held to be an unreasonable application of clearly established federal law. (Williams, supra, 529 U.S. at 413; Lambert v. Blodgett, 393 F.3d 943, 978 (9th Cir. 2004); Rice v. Collins, 126 S.Ct. 969, 975 (2006).)

In Greenholtz and Allen the Supreme Court established that, when statute or regulatory provisions are phrased in mandatory terms, the BPH has a duty to "use judgment in applying the standards ... set by [the] statutory or regulatory scheme." (Allen,, supra, 482 U.S. at pp. 375-378; Greenholtz, supra 442 U.S. at p. 12; McQuillion, supra, 306 F.3d at pp. 901-903;

Biggs v. Terhune, 334 F.3d 910, 914-15, (9th Cir. 2003).) Thus, while "[t]he [BPH's] discretion in parole matters has been described as 'great' [citation] and 'almost unlimited' [citation]" (Rosenkrantz, supra, 29 Cal.4th at p. 655), the "explicit guidelines" of the regulations places some limitations upon the broad discretionary authority of the BPH. (Allen, supra, 482 U.S. at p. 378 fn(s) 9 & 10; 15 CCR §§ 2400, 2401, 2402 et seq.)

Moreover, the Supreme Court has clearly established that a parole board's decision deprives a prisoner of due process with respect to his constitutionally protected liberty interest in a parole release date if the board's decision is not supported by "some evidence in the record," or is "otherwise arbitrary." (Superintendent v. Hill, 472 U.S. 445, 457 (1985); Irons v. Carey, 479 F.3d 658, 662 (9th Cir. 2007).) Additionally, the evidence underlying the [BPH's] decision must have some indicia of reliability." (McQuillion, supra, 306 F.3d at p. 904.)

A. The State Court's Unreasonable Application of "Clearly Established" Law

In the present case, the Superior Court correctly identifies the legal principle -- requiring the BPH to "set a release date unless it determines that 'certain designated findings are made'" (442 U.S. at 12; 482 U.S. at 377078) -- but unreasonably applied the principle to the facts of petitioner's case when it ruled that "the BPH was not required to consider the factors set forth in [BPH] regulations." (Ex. J at p. 3.)

Both state and federal courts have recognized that BPH regulations defining the manner in which suitability determinations are to be made are set forth in section 2402 of the California Code of Regulations. (See Irons, supra, 358 F.Supp.2d at p. 942 [noting the non-exclusive list of factors to be consider when determining an inmate's suitability or unsuitability for parole]; Martin v. Marshall, 431 F.Supp.2d 1038 [same]; Rosenkrantz, supra, 29 Cal.4th at pp. 653-54 [same]; Dannenberg, supra, 34 Cal.4th at pp. 1078-1080 [same].)

Under California law, the Supreme Court has repeatedly emphasized that the BPH is "obligated to consider all relevant factors" (Minnis, supra, 7 Cal.3d at p. 645 (1972) and that "[i]f the decision's consideration of the specified factors is not supported by some evidence in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the [BPH] to vacate its decision denying parole." (Rosenkrantz, supra, 29 Cal.4th at p. 658.)

Therefore, in assessing whether or not there was "some evidence" to support the BPH's denial of parole, the Superior Court was required to consider the regulations which guide the BPH in making its parole suitability determinations, it had no authority to usurp the regulatory provisions of section 2402, and then deprive Petitioner of his constitutional right "to have his application for [those] benefits 'duly consider' based upon an individualized consideration of all relevant factors." (Rosenkrantz, supra 29 Cal.4th at p. 655.)

Petitioner acknowledges the federal court's long standing practice of paying great deference to the views of those courts who are familiar with the intricacies and trends of local law. (Bishop v. Wood, 426 U.S. 341, 346 fn. 10.) Particularly, to the state court's interpretations of state statute. However, the Ninth Circuit has made it clear that state courts may not interpret their law in such an arbitrary manner that its interpretation is nothing but an evasion of federal due process requirements. (See Peltier v. Wright, 15 F.3d 860, 862 (9th Cir. 1994) (holding that "we are bound by the state's construction [of state laws] except when it appears that its interpretation is an obvious subterfuge to evade the consideration of a federal issue"); see also Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir. 1989).)

The question ultimately to be decided here is whether the Superior Court's interpretation is so unreviewable, i.e. the facts underlying any pro forma decision can stand as "due process" in denying parole suitability, that the federal standard of "a liberty interest protected by the Due Process Clause" is, in essence, completely eviscerated.

B. The State Court's Unreasonable Conclusion

The Superior Court concluded that the BPH denied parole on the basis that it determined public safety consideration required more incarceration because petitioner's statement that "he thought he was going to a fight ... was minimizing the gravity of the crime and his involvement and demonstrated a lack of insight." (Ex. J at p. 3.) To the contrary, on this record

the BPH explicitly utilized the foregoing statement not as a basis for denying parole, but rather, to support its separate decision to put off the next hearing for two years.[1/] (Ex. A at p. 63, lns 15-18 and p. 64, lns 10-17.)

Even if, assuming arguendo that the BPH denied parole for "lack of insight," case law provides that a BPH's denial based on an inmate's "need for therapy is an even more troubling aspect of its decision." (In re Ramirez, 94 Cal.Ap..4th 549, 571 (2001), disapproved on other grounds in Dannenberg, supra, 34 Cal.4th at p. 1100.) Particularly, when, as here, "[t]he clinical psychologist who prepared the psychological report for the hearing ... specifically advised the [BPH] that there was no psychiatric ground for denying parole." (Ibid.; Ex(s) E & I.) Thus, after ruling that the BPH's "conclusion appears to be simply one repeated often to add another factor to the non-suitability conclusion," the district court in Irons issued and opinion admonishing that "a conclusion by lay [BPH] commissioners that petitioner has not yet achieved required therapy for insight or other reasons is not reasonably sustainable, and a state court's conclusion to the contrary is patently unreasonable." (Irons, supra, 358 F.Supp.2d at p. 948 948.)

---

1. The board is required to hear each case annually, except the board may schedule the next hearing no later than "two years after any hearing at which parole is denied if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year and states the basis for the finding." (See Ex. A at p. 63, lns 16-18; Penal Code § 3041.5(b)(2)(A)-(B).)

In the instant case, the information before the BPH overwhelmingly established that the BPH's conclusion lacks even "some evidence." As is evident in the Mental Health Evaluation reports prepared by Dr. C. Saindon, Ph.D on January 23, 2002, noting that petitioner has "a good deal of insight into the negative aspects of gang involvement, which he regrets to this day" and he "showed significant insight into his commitment offense" (Ex. E at p. 4) and Dr. C. Schroeder, Ph.D. concluding that the "remorse" petitioner expresses is sincere and that in "hindsight, he sees that he perhaps could have stopped the incident and now has great empathy and remorse for the family of the victim." (Ex. I at p. 2.)

Indeed, neither psychologist subscribe to the BPH's need for therapy, but instead, noted to the contrary that petitioner "does not have a mental health disorder which would necessitate treatment either during his incarceration period or following parole" (Ex. E at p. 6) and that "psycholotherapy is not part of his program."[2/] (Ex. I at p. 3.)

Accordingly, the BPH's findings was an affront not only to petitioner "who was open in his conversation" with the psychologist (Ex. E at p. 4), but also to the California Department of Corrections and Rehabilitation, which provided the therapeutic programs. Thus, the state's finding must be rejected.

---

2. The psychologist observed in his reports that petitioner has had one incident of depression resulting in an attempted suicide at age 16. (Exhibit(s) E at p. 3; I at p. 2.) Of particular importance, Dr. Saindon found "no evidence of mood or thought disorder." And further noted that petitioner's judgment appeared to be sound." (Id. at 4.)

Further, there was no evidence to support the BPH's determination that petitioner has minimized his role in this crime or the Superior Court's denial of relief based on this finding. The BPH's decision stated: "It was gang activity and you told this panel that 'I thought I was going to a fist fight', that minimizes the gravity of the crime ⌜and] your involvement in it⌜.]" (Ex. A at p. 64.) Although evidence in the record indicates that petitioner engaged in the conduct described in the foregoing quotation, the "circumstances that petitioner committed the act does not support the ⌜BPH's] determination that ⌜petitioner minimized the gravity of the crime] when he described the altercation, or that petitioner ⌜minimized his role in it when he stated that "no one intended to kill the victim]." (Id. at p. 65; Rosenkrantz, supra, 29 Cal.4th at 680.) This aspect of the BPH's decision omits any consideration of the evidence supportive of petitioner's claim. (15 CCR § 2401(b).)

For example, the BPH does not dispute the evidence establishing that while the fist fight was going on co-defendant "⌜Usumang Muhamed] reached around ⌜petitioner] and shot the ⌜victim], killing him and narrowly missing ⌜petitioner]." (Ex(s) A at p. 5; D at p. 2; H at p. 1.) Nor does the BPH dispute evidence showing that petitioner "was not the shooter," and that there was no evidence showing "⌜petitioner] suggested, encouraged or aided or abetted the shooting in any way⌜, or a]fter the shooting ⌜petitioner] angrily confronted the shooter demanding to know why he brought out the gun and

asserting that he, [petitioner], didn't know the gun was going to be used." (Ex(s). A at p. 35; D at p. 2.)

Although the BPH possesses the discretion to characterize petitioner's response to this event as "hard to believe" (Id. at p. 65), nothing in the record upon which the BPH relies supports the determination that petitioner tends to minimize his role in the crime or he hasn't developed insight into the causative factors of the crime by describing it as an unintentional act.

A more complete quotation of petitioner's statement at the parole hearing at which he had indicated that he believed he was "going to a fist fight" establishes that petitioner took responsibility for his actions. In his closing statement petitioner stated in part:

> "In hindsight I wish I could have changed what happened on that tragic day, but the truth is I really did not know what was about to happen that very instant that took Angel's life. At the time I honestly believed I as getting into a fist fight and nothing more. I did not take Angel's life, it was never my intention that such a tragic incident would occur. Again I was there for a fist fight, nothing I say or do at this point will ever change what happened on that tragic day. All I can do is accept full responsibility for my action alone."

(Id. at pp. 56-57.) Conversely, these statements by petitioner do not constitute "some evidence" that his lack of intent minimizes his culpability as the BPH determined. (Id. at p. 45.)

Accordingly, the State's finding is contrary to "clearly established" United States Supreme Court precedence and must be rejected. (Hill, 472 U.S. at p. 455; Sass v. California Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006).)

II

THE BPH'S RELIANCE SOLELY ON THE FACTS AND RE-CHARACTERIZATION OF PETITIONER'S COMMITMENT OFFENSE TO DENY PAROLE RESULTED IN A VIOLATION OF DUE PROCESS UNDER THE 5TH AND 14TH AMENDMENTS

A. The Nature of Petitioner's Offense Does Not Supply "Some Evidence" Rationally Demonstrating His Release Would Unreasonably Endanger Public Safety

The California Supreme Court has clarified California's "some evidence" test in this respect. Specifically, the Court noted that "[w]hen the [BPH] bases unsuitability on the circumstances of the commitment offense, it must cite 'some evidence' of aggravating factors beyond the minimum elements of [the] offense" (Dannenberg, supra, 34 Cal.4th at p. 1095 fn. 16) and "where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for [the] offense" (Rosenkrantz, supra, 29 Cal.4th at p. 654) -- the inmate has "an expectation that parole will be granted." (Id.; Allen, supra, 482 U.S. at p. 381.)

Here, the BPH again determined that Petitioner would pose a current unreasonable risk to society if released from prison.[3/]

---

3. Petitioner's initial parole consideration hearing was conducted on May 13, 2002, at which, he was found unsuitable for parole and denied one year. The panel relied upon the same factors at issue in this petition. (Ex. B at p. 57.) The panel further found that petitioner had an escalating pattern of criminal conduct. (Id. at p. 58.) At an August 3, 2004, subsequent parole consideration hearing, the BPH panel found petitioner unsuitable for parole for a period of one year. In support of its findings the panel noted that the offense was "carried out in an especially cruel and callous manner." (Ex. C at p. 58.) Additionally, the panel relied upon the same factors at issue here. (Ibid.)

(Exhibit A.) In making this determination, the BPH found that (1) "the offense was carried out in an especially cruel and callous manner" (id. at p. 60, lns 23-25), (2) "the offense was carried out in a dispassionate and calculated manner" (id at p. 61, lns 1-3), and (3) "the offense was carried out in a manner demonstrating exceptionally callous disregard for human suffering." (Id. at p. 61, lns 5-8.)

The BPH determined that petitioner's crime was more egregious than minimally necessary to convict him of second degree murder because petitioner attacked and beat the victim, who was ultimately shot in the back and died at the scene, it was a confrontation between gang members preplanned by lying in wait for the victim as he walked home and it occurred near a school and there was a clear opportunity to cease but petitioner continued. (Ex. A at pp. 60-61.)

Some of these characteristics are inaccurate and lack any support in the record. For example, there is no dispute that

> "On the day of the incident, some of [petitioner's] friends went to the McDonalds near Fullerton High School in Northern Orange County. [Petitioner] was not present at the time. One of [petitioner's] friends got in a staring match with the decedent and some of his friends who were members of 'Toker Town' a long established Hispanic gang in fullerton. Essentially the Toker Town group told [petitioner's] friends that they were not welcome in Fullerton where some of them already lived and they should get out of town. Angered by this [warning] [petitioner's] friends decided to confront the decedent's group after school got out that day. [Petitioner] was called to help out in case they should be out numbered. The group waited after school and confronted the decedent and one of his friends about two blocks south of Fullerton High School, not on school grounds. From all appearances this was intended to be a fist fight. [Petitioner] and the friends that had been in the stare down

> approached the decedent and another young man who were walking on the sidewalk. A fist fight is how it started, however the decedent's friend fled just after the punching began and that left ⌜petitioner] and his friend fighting the decedent who was significantly larger than either of them. ...While the fight was going on a third member of the group ⌜petitioner] was part of ran forward to the scene⌝,] ...reached around ⌜petitioner] and shot the decedent killing him and narrowly missing ⌜petitioner]. ⌜Petitioner] angrily confronted the shooter demanding to know why he brought out the gun and asserting that he, ⌜petitioner], didn't know the gun was going to be used."

(Id. at p. 35; Ex. D.)

1) The BPH's Dispassionate and Calculated Finding Lacks Evidentiary Support in the Record

As the court's have concluded "'Dispassionate' means free from emotion or prejudice; calm and impartial., ...No rational person could describe ⌜this offense] as calm and without emotions." (Rosenkrantz v. Marshall, supra, 444 F.Supp.2d 1096 footnote 4, quoting In re Rosenkrantz, (2000) 80 Cal.App.4th 409, 419-420.) To the contrary, this offense is replete with emotion. First, petitioner's friends were angered by the decedent's order to "get out of town." (Ex. D at p. 2.) Next, fearful of the number of Toker Town group members petitioner's friends would have to face, petitioner was asked to come along, which he did. And finally, after the shooting, petitioner angrily demanded to know why his co-defendant brought out the gun. (Ibid.) Accordingly, the BPH's finding that this case was dispassionate is contrary to the weight of the evidence indicating otherwise. (Hill, supra, 472 U.S. at p. 455; Sass, supra, 461 F.3d at pp. 1128-1129.)

Likewise, the statement that the crime was "calculated" (Ex. A at 61) contradicts all the evidence in the record. In finding petitioner guilty of second degree murder, the jury was instructed with the natural and probable consequences doctrine which permitted the jury to find that petitioner was guilty of second degree murder if he aided and abetted the fist fight and that the shooting was a natural and probable consequences of aiding and abetting the fight. (Ex. D.) Thus, there was no requirement that petitioner form the specific intent to kill or be aware that anyone else formed the specific intent to kill.4/

The BPH viewed the offense as "dispassionate and

---

4. Under the natural and probable doctrine, "...the aider and abettor in a proper case is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable consequences of any act that he knowingly aided or encouraged." (People v. Croy, (1985) 41 Cal.3d 1, 12, fn. 5; People v. Prettyman, (1996) 14 Cal.4th 248.) Thus, the pivotal question is, "whether the collateral criminal act was the ordinary and probable effect of the common design or was a fresh and independent product of the mind of one of the participants, outside of, or foreign to, the common design." (People v. Nguyen, (1993) 21 Cal.App.4th 518, 531 citing People v. Kaufman, (1907) 152 Cal. 331, 337; See also, People v. Durham (1969) 70 Cal.2d 171, 182-183.) Each juror must be convinced, beyond a reasonable doubt, that the defendant aided and abetted the commission of a criminal act, and that the offense actually committed was a natural and probable consequence of that act. (People v. Prettyman, supra, 14 Cal.4th at 268.) In order to determine whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted, a jury must determine whether, "under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (People v. Nguyen, supra, 21 Cal.App.4th at 531 citing, People v. Woods (1992) 8 Cal.App.4th 1570, 1587; See People v. Mendoza (1998) 18 Cal.4th 1114, 1133; People v. Price (1991) 1 Cal.4th 324, 443.)

calculated'" without considering that petitioner "was not the shooter and no evidence existed to show that he suggested, encouraged or aided or abetted the shooting in any way." (Ex. A at p. 35m lns 16-19.) Recent case law provides that "[w]hile an accomplice is treated the same as the perpetrator of a crime for the purposes of determining guilt and imposing sentence (Citation), continuing to do so in making a parole suitability determination violates the prisoner's due process right to 'an individualized consideration of all relevant factors.'" (In re Montgomery, (2007) DJDAR 16717, 16122; see also In re Tripp, 150 Cal.App.4th 306, 319, quoting Rosenkrantz, supra, 29 Cal.4th at p. 655.) Consequently, the BPH's actions make a mockery of California law governing aiding and abetting and the natural probable consequences theory of second degree murder.

2) The BPH's Exceptionally Callous Finding to Deny Parole In This Case Was Erroneously Applied

Similarly, the BPH's denial based upon a finding that -- the "offense was carried out in a manner which demonstrates an exceptionally disregard for human suffering, ...in that it occurred near a school and there was a clear opportunity for [petitioner] to cease but [he] continued," (Ex. A at p. 61) -- does not fit within the regulatory provisions which "contemplates that the victim was made to suffer in some exceptional way." (Rosenkrantz v. Marshall, supra, 444 F.Supp.2d at pp. 1083-1084, quoting In re Scott, 119 Cal.App.4th 871, 892 (2004) (holding that the offense in question must have been committed in a more aggravated or

violent manner "than the simple cruelty and callousness necessary to find that a defendant killed with malice.")

In Scott, the court admonished that "to demonstrate 'an exceptionally callous disregard for human suffering' (citation), the offense in question must have been committed in a more aggravated or violent manner than ordinarily shown in the commission of second degree murder." (Id. at p. 891.) For an example, the court pointed to the circumstances of In re Van Houten (2004) 116 al.App.4th 339 to illustrate the sort of gratuitous cruelty this finding required, explaining that "the prisoner in that case was involved in multiple stabbings of a woman with a knife and bayonet. While she was lying down, the victim was made aware her husband was suffering a similar fate." (Id.) The court then concluded "[t]hese acts of cruelty far exceeded the minimum necessary to stab a victim to death." (Ibid.) Here, the BPH fails to establish a nexus between its finding and any acts of cruelty beyond the minimum necessary to the victims death that petitioner was required to commit. (Dannenberg, supra, 34 Cal.4th at p. 1095 fn. 16.)

Accordingly, since the relevant evidence shows no more callous disregard for human suffering than is shown by most second degree murder offenses, the BPH's characterization of petitioner's actions as more cruel, dispassionate, calculated, or committed in a manner more callous than most other second degree murders in which the courts have found to lack "some evidence" supporting a denial of parole, is unreasonably sustainable. (See In re Smith 109 Cal.App.4th 489 (2003);

Scott, supra, 133 Cal.App.4th 573; In re Lee, 143 Cal.App.4th 1400 (2006); In re Weider, 145 Cal.App.4th 570 (2006); In re Elkins, 144 Cal.App.4th 475 (2006).)

B. The Arbitrariness of the BPH's Determination

"Establishing that the commitment offense involved some elements more than minimally necessary to sustain a conviction is a step on the path of evaluating a prisoner's current dangerousness, but it is not the final step under the regulations. Due process affords an inmate 'an individualized consideration of all relevant factors.'" (Allen supra, 482 U.S. at p. 375; Irons, supra, 479 F.3d at p. 662; Tripp, supra, 150 Cal.App.4th at p. 319; Rosenkrantz, supra, 29 Cal.4th at p. 655.)

Under BPH regulations, the prisoner's "motivation" for the offense tends to show suitability when it was "the result of significant stress in his life, especially if the stress has built over a long period of time" (15 CCR § 2402, subd. (d)(4)) In this particular case, petitioner had suffered from a severe state of depression at the of 16, resulting in attempted suicide and the use of drugs, which psychologist concluded "may have contributed to his state of mind and poor judgment during the time of the crime." (Ex(s) E at pp. 3 & 5; I at p. 3.) The Life Prisoner Evaluation Report prepared in April 2002 stated that the crime was "episodic" in nature and was not indicative of petitioner's nature. (Ex(s) G and H.)

The BPH's decision fails to mention or consider inter alia, the significant stress in petitioner's life. The BPH was

obligated to consider the significant stress petitioner was experiencing at and prior to the time he committed his offense. (Rosenkrantz, supra, 29 Cal.4th at p. 679; In re Scott, 119 Cal.App.4th 888, 889; In re Scott II, 133 Cal.App.4th 573, 596.) The BPH's failure to consider whether petitioner committed his offense "'as a result of significant stress in his life' is arbitrary and capricious in the sense that it failed to apply the controlling legal principles to the facts before [it]." (Scott II, supra, at p. 596; 15 § 2402, subd. (d)(4).)

Additionally, petitioner was only 19 years of age at the time of the commitment offense, and is now an adult. The BPH was also required to consider this factor under the regulations as a circumstance supportive of petitioner's application. Yet, it failed to do so. (15 CCR § 2402, subd. (d)(6); see also Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) [noting "Inexperience, less intelligence and less education makes a teenage less able to evaluate the consequences of his or her conduct while at the same time he she is more apt to be motivated by mere emotion or peer pressure than as an adult"].)

Moreover, while the BPH "commended" petitioner for the way he has "programmed" in custody, its decision failed to reflect consideration of petitioner's institutional behavior as a circumstance tending to show his suitability for parole. (Ex. A at p. 61.) This factor is a factor the BPH is required to consider under the regulations. (§ 2402, subd. (d)(9).)

CONCLUSION

Because the circumstances of this crime do not amount to "some evidence" supporting the conclusion that petitioner poses a "current" unreasonable risk of danger if released from prison and the BPH offered no reliable evidence supporting a finding of unsuitability, the BPH and state court determination(s) were unreasonable in light of the evidence presented at the parole hearing. Thus, the state court proceedings amounted to an unreasonable application of clearly established Supreme Court precedent. (Rosenkrantz v. Marshall, 444 F.Supp.2d 1063 (2006).) Petitioner therefore, respectfully request this Court to grant the petition for writ of habeas corpus and order Respondent to release him forthwith unless legitimate post-conviction evidence can be found to suggest that his release would pose a current danger to public safety.

Dated: 1-22-2008

Respectfully submitted,

Sieu Phong Ngo
Petitioner, Pro Se

DECLARATION OF SERVICE BY MAIL

Case Name: In re SIEU PHONG NGO:

I, the undersigned, hereby certify that I am a resident of the state of California, County of Monterey. I am over the age of 18 years and am a party to the within action. My business/residence address is P.O. Box 689, Soledad, California, 93960-0689.

On January 22, 2008, I caused to be served on the parties a true and correct copy of the attached **PETITION FOR WRIT OF HABEAS CORPUS and EXHIBITS A thru L** as follow:

U.S.MAIL

Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004

I declare under penalty of perjury that the following is true and correct.

Declarant